No. 18243

In the United States Court of Appeals for the Ninth Circuit

National Labor Relations Board, petitioner

v.

J. R. Simplot Company, respondent

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE RESPONDENT, J. R. SIMPLOT COMPANY

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JURISDICTION

Respondent accepts and agrees to the statement of jurisdiction as set forth in the brief of the National Labor Relations Board filed herein.

STATEMENT OF THE CASE

As stated by the Board in its brief filed herein, the Board has found that the Respondent violated Sections 8 (a) (1) and (5) of the National Labor Relations Act, as amended,[1] (61 Stat. 136, 73 Stat. 519, 29 U.S.C.A. Sections 151 *et seq.* — hereinafter referred to as the "Act") by admittedly refusing to bargain collectively with the American Federation of Grain Millers, AFL-CIO (hereinafter called the Union). The facts pertaining to the representation and unfair labor practice proceedings are as follows:

I. The Representation Proceeding

Pursuant to the Board's Amended Decision and Direction of Election, elections (hereinafter referred to as the "first elec-

[1] The pertinent statutory provisions in addition to those printed in the appendix of the Board's Brief are printed in the appendix hereto *infra*.

tion") were conducted at the Respondent's Heyburn, Idaho Food Processing Plant on March 22, 1961. (R11, 62-64).[2] The petition for an election at said plant had been filed by the Union on April 25, 1960. (R.10). The elections at the Heyburn Plant were conducted concurrently in voting groups designated as Groups A and B, hereinafter referred to as the Starch Plant Unit and Processing Plant Unit respectively. (R.82). The majority of the votes cast in both groups were for "no Union." (R. 11).

On March 28, 1961, the Union filed objections to the election. (R. 22-23).

On June 7, 1961, the Regional Director of the Nineteenth Region issued his Report on Objections to Election. (R. 25 hereinafter referred to as Regional Director's Report) With respect to Objections 1 and 2 the Regional Director stated the following.[3]

> Objection No. 1: the gravamen of this objection is, and Employer admits, that on February 20th, 1961, it made effective a ten cent (10¢) hourly wage increase for all employees employed in the voting units. . . . Investigation discloses that neither Petitioner nor Intervener was consulted, nor that either acquiesced. Nor is it shown that the increase was one of annual precedence, or was announced to the employees in advance of the aforementioned February 21, 1961.
>
> Objection No. 2: Investigation discloses that between

[2] References to the pleadings, the decisions and order of the Board. the stipulated record, and other papers, reproduced as "Volume I Pleadings," are designated "R."

[3] Since the Board based its findings on objections 1 and 2, the comments pertaining to Objections 3 and 4 are not pertinent herein.

February 15, 1961, and the date of the election, Employer addressed hand bulletins, correspondence and questionnaires to its employees in which it pointed out (a) Employer's intent "to give the employees the same fair and equitable treatment insofar as job classifications, local conditions and type of operations permit" regardless of union affiliation, (b) specifically invited employees' attention to the identity between specific conditions of employment at the Heyburn Plant and those at plants covered by Petitioner's collective bargaining agreements and (c) utilized a local newspaper to advertise increased benefits negotiated at Union plants of the Employer, announced that those benefits could not be put into effect at subject plant by reason of the impending NLRB election, and then, contrary to the announcement, it did make the same increases effective at Heyburn. (R. 26-27).

The Regional Director in his findings and conclusions in said Report stated:

Objection No. 1: the undersigned concludes that objections to the wage increase of February 20, 1961, raised substantial and material issues with respect to the election. While it is well established that granting wage increases during the pendency of an election is not, *per se*, grounds for setting aside an election, such cases are an exception to the general rule that precludes an employer from granting wage increases in order to influence the employees in their selection of a bargaining representative.

Absent evidence that the timing of the wage in-

creases or announcement thereof were governed by factors other than the pendency of the election, the Board has set aside elections on the ground that the granting of the benefits at this particular time was calculated to ,and did, influence the employees in their choice of a bargaining representative.

. . . .

The undersigned therefore recommends that the objection to the wage increase which was made effective on February 20th, 1961, be sustained.

Objections 2, 3, and 4: The undersigned inclines to the belief that these Objections, excepting Objection No. 3 as to which there is no evidence, must be treated in concert, and viewed in their totality . . . In its effort to encourage a given election result, Employer generated an atmosphere which was calculated to, and did, interfere with the elections by destroying the laboratory conditions requisite thereto. While the undersigned recommends that Objection 3 be overruled, he recommends that Objections 2 and 4 be sustained. (R. 28-29.)

On June 16, 1961, the Respondent filed its Exceptions to Report on Objections to Election (R. 31 — hereinafter referred to as Exceptions). In these Exceptions, the Respondent noted that prior to the time that negotiations with the Union and the sister plants came to a close, management decided that it would put into effect the same wage increase at Heyburn that it placed into effect at the other two plants. (R. 31-32). As stated in the Exceptions the reasons for granting the increase at Heyburn were 1) due to the similarity of the products manufactured, and the fact that there was an exchange of management and production personnel among these plants, the Company desired to maintain if possible a standard wage rate at all of its plants

n the area, and 2) the Company desired to be competitive with ne wage rates established by competing plants in the area. R. 31-32).

With reference to the conclusions of the Regional Director oncerning Objections 2, 3, and 4, the Company stated that ich conclusions:

> are not based upon the facts surrounding the conduct of the election and further that the conclusions of the Regional Director are inferential by their own admission, and the statements therein contain so much sham, irrelevant, and redundant matter that they should be disregarded in their entirety by the Board. (R. 32)

On August 16, 1961, the Board issued its Supplemental Decision, Order and Direction of Second Election in which stated the following:

> The Board has considered the Petitioner's objections, the Regional Director's Report and the Exceptions thereto, and hereby adopts the Regional Director's findings and recommendations as modified below. Accordingly we shall set the elections aside and direct that new elections be held. (R. 63)

The modifications referred to in the aforesaid statement were as follows:

> In the absence of specific exceptions thereto, we shall adopt the Regional Director's recommendation that Objection 3 be overruled and hereby overrule it. We agree with the Regional Director, contrary to the Employer's exceptions, that the conduct with respect to Objections 1 and 2 constituted promises of and granting of benefits whch were calculated to interfere with the election

> and formed a basis for setting it aside. We need not, and do not, consider Objection 4, nor do we pass upon the question whether Employer's conduct considered as a whole created an atmosphere rendering the expression of free choice impossible. (R. 63)

Hence, although the Regional Director had specifically found that the action of the Respondent with respect to Objections 1, 3 and 4 had generated an atmosphere which was calculated to *and did* interfere with the elections by destroying the laboratory conditions requisite thereto, (R. 28-29) the Board specifically refused to make such a finding and chose to rest its decision on the flat statement that the conduct with respect to Objections 1 and 2 "constituted promises of and granting of benefits which were calculated to interfere with the election and formed a basis for setting it aside." The Board expressly did not consider Objection 4. (R. 63).

At the second election ordered by the Board for the two bargaining units at the Heyburn Plant the Union received a majority of the votes in the Starch Plant Unit. (R. 13). A majority of the employees voting in Group B voted for "no Union." (R. 13). Pursuant to the election the Regional Director certified the Union as a representative of the employees in the Starch Plant Unit for the purposes of collective bargaining. (R. 13).

Subsequently the Union requested the Respondent to meet with it for the purpose of negotiating a collective bargaining agreement covering the employees in the Starch Plant Unit. (R. 13). The Respondent declined and refused to meet and bargain with the Union. (R. 13)

II. The Unfair Labor Practice Proceeding 19-CA-2374

Pursuant to charges filed by the Union, following Respondent's refusal to bargain, the Board filed its complaint in the instant case. (R. 4).

In its answer to said complaint, the Respondent *inter alia* admitted that it had refused to meet and negotiate with the Union but denied that the certification of the Union as a collective bargaining agent for the Starch Plant employees was valid or lawful. (R. 8). In addition, the Respondent alleged that the second election held for the employees in the Starch Plant bargaining unit was

> invalid and unlawful in that the Board, contrary to the pertinent facts and evidence, without ample supporting evidence, arbitrarily, capriciously, unlawfully, and without good reason set aside the election held . . . on March 22, 1961 . . . hence the certification of the union . . . was invalid and thus Respondent has no duty and has had no duty to bargain with the union pursuant to said certification or otherwise. (R. 8)

The Union, Respondent, and Counsel for the General Counsel entered into a Stipulation of Facts on the 9th day of April, 1962. (R. 9). In this stipulation, the parties agreed to waive the hearing before a Trial Examiner with the proviso that if the Board as part of its action in the case determined and ruled that the Respondent's action referred to in Objection 4 of the Regional Director's Report on Objections to Election was a basis for setting aside the election, or if the Board as part of its action in the case determined and ruled that the Respondent's alleged conduct referred to in the Regional Director's Report considered as a whole created an atmosphere rendering the ex-

pression of free choice impossible, "then nothing (in the stipulation) shall be construed to be a waiver of any right by any party to this stipulation to a hearing to adduce additional evidence pertaining to the aforesaid matters which any party would have had if it had not entered into this stipulation." (R. 9, 12).

The Board concluded that the Respondent's refusal to bargain was in violation of Sections 8 (a) (5) and (1) of the Act. (R. 86) and ordered the Company to cease and desist from the unfair labor practice found (R. 87).

III. The Unfair Labor Practice Proceeding 19-CA-2185

In addition to the objections to the first election filed by the Union, the Union, shortly after the first election also filed unfair labor practice charges. (R. 33) Pursuant to these charges, the Regional Director issued a Complaint and Notice of Hearing in which it was alleged *inter alia* that the Respondent "granted to its employees at its Heyburn, Idaho Food Processing Division Plant, wage increases in connection with their refraining from union or concerted activities, or becoming members of or giving any assistance or support to the Grain Millers or Teamsters Food Processing Employees' Union, Local No. 879, or in order to induce them to do so." (R. 34). The Intermediate Report of the Trial Examiner in that case was issued on September 26, 1961, in which the Trial Examiner found that, with respect to the wage increase, the Respondent had not committed an unfair labor practice. (R. 63). The findings and recommendations o fthe Trial Examiner in that case where pertinent to this case will be referred to *infra.*

SUMMARY OF ARGUMENT

In reply to the Board's claim that the Respondent, by failing and refusing to bargain with the Union as the collective bargaining agent of its Starch Plant employees had committed an unfair labor practice, the Respondent asserts that it is not required to bargain with a Union certified as the collective bargaining agent at the Starch Plant pursuant to the second election if the second election was held within twelve months of a valid election. The Respondent contends that the second election was held within twelve months of a valid election inasmuch as the first election should not have been set aside by the Board. Hence the Respondent submits that there is no basis for the Board to find that it has committed an unfair labor practice with respect to its refusal to bargain with the Union.

The Respondent in presenting its argument in this matter, concedes that the Board has broad discretionary power in the supervision of elections and in determining matters pertaining to the selection of bargaining representatives in general. It further concedes that elections may be set aside because of conduct which does not constitute an unfair labor practice.

However Respondent contends that, despite this broad discretionary power held by the Board, its findings, decisions and orders in such matters must be in accordance with due process and must not be founded upon arbitrary and capricious action. Hence the Board's action must be supported by substantial evidence and be arrived at on proper grounds in accordance with proper and fair procedures. The Respondent thus will show that the action of the Board in this matter was arbitrary and capricious and that as a result of the arbitrary, capricious action the Respondent would, if the Board's order is

enforced, be denied of due process of law under the Fifth Amendment to the Constitution of the United States; that allowing the Board to follow the procedures used in this case and make its order directing a second election on the grounds that it did, would allow the Board to subvert the provisions of the Act pertaining to unfair labor practices and for all practical purposes find the Respondent guilty of unfair labor practices by the means of summary election procedures; and that such action by the Board would deny Respondent of its right to freedom of speech under the First Amendment to the Constitution of the United States.

The Respondent contends that its allegations are not specious but rather that the Board's action in this case infringes valuable rights of the Respondent. The Respondent further contends that its contentions are not born of a misconception of the nature and purpose of the Board's representation proceedings. In addition the Respondent urges that nothing contained in the Act, Board Regulations, or Board or Court Decisions requires exceptions to a Regional Director's report on elections to present specific evidence of conduct which *prima facie* would warrant the Board's rejecting the Regional Director's Report. Rather the regulations contemplate that such Exceptions must only create issues of fact, and Respondent contends that its Exceptions to the Regional Director's Report filed in this case created material and substantial issues of fact.

Thus the Respondent is asking this Honorable Court to refuse enforcement of the Board's order in this matter, lest the Respondent be deprived of valuable rights, and this case become precedent for the Board to arbitrarily and capriciously deprive others of similar valuable rights.

ARGUMENT

I.

Respondent is not required to bargain with the Union certified as the collective bargaining agent of the starch plant pursuant to the second election if the second election was held with twelve months of a valid election.

Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146, 61 S. Ct. 908 (1941); *NLRB v. Shirlington Supermarket, Inc.,* 224 F. 2d 649 (4th Cir.), *cert. denied,* 350 U.S. 914, 76 S. Ct. 198 (1955).

II.

Although the Board has broad discretionary power in the supervision of elections and in determining matters pertaining to the selection of bargaining representatives, nevertheless in order for the Board's Actions and Orders to be valid and enforceable the Board must act in accordance with due process of law on the basis of substantial evidence without being arbitrary and capricious.

NLRB v. Indiana & Michigan Electric Company, 318 U.S. 9, 63 S. Ct. 394 (1943); *NLRB v. Sidran,* 181 F. 2d 671 (5th Cir. 1950); *NLRB v. West Texas Utilities Co.,* 214 F. 2d 732 (5th Cir. 1954); *Foreman & Clark, Inc. v. NLRB,* 215 F. 2d 396 (9th Cir.), *cert. denied,* 348 U.S. 887, 75 S. Ct. 207 (1954); *NLRB v. Shirlington Supermarket, Inc., supra; NLRB v. National Plastic Products Co.,* 175 F. 2d 755 (4th Cir. 1949).

III.

The Board's action in setting aside the first election was unreasonable, arbitrary and capricious.

A. *What was the Basis for Board's Order Setting Aside First Election and Directing the Second Election.*

As noted previously the Board in ordering that the first

election be set aside, contrary to its usual procedure, did not find that the Respondent's conduct ". . . created an atmosphere rendering the expression of free choice impossible" but rather held that the conduct referred to in Objections 1 and 2 of the Regional Director's Report "constituted promises of and granting of benefits which were calculated to interfere with the election and formed a basis for setting it aside." (R. 63). Thus the Board's Order in this matter must rest on the following findings of fact:

1. That Respondent gave a wage increase to its employees at the Heyburn Plant during the pendency of the first election;
2. That the matters referred to in Objection 2 (hand bulletins, newspaper advertisement, etc.) as stated in the Regional Director's Report constituted promises of benefit made by Respondent; and
3. That the aforementioned matters were calculated to interfere with the election.

B. *The Action of the Board in Summarily setting Aside the First Election Without Ordering a Hearing was Arbitrary and Capricious.*

The action of the Board in this case was based solely on the Regional Director's Report which was in turn based on an *ex parte* investigation made under the direction of the Regional Director. (R. 26, 63). The evidence supposedly garnered in the *ex parte* investigation is nowhere in the record. Nor is there any indication in the record as to how the evidence was obtained. Nevertheless, on the basis of some unknown information obtained in some unknown manner the Regional Director made findings and conclusions and forwarded his report to the

Board recommending that the election be set aside because:

1. Absent evidence that the timing of the wage increases or announcement thereof were governed by factors other than the pendency of the election, the Board has set aside elections on the ground that the granting of the benefits at this particular time was calculated to, and did, influence the employees in their choice of a bargaining representative . . . The undersigned therefore recommends that the objection to the wage increase which was made effective on February 20th, 1961, be sustained. (R.28).
2. The conduct referred to in Objections 2 and 4 "generated an atmosphere which was calculated to, and did, interfere with the elections by destroying the laboratory conditions requisite thereto." (R. 29).

The Respondent clearly controverted the findings and conclusions of the Regional Director in its Exceptions to his report. As to the wage increase the Respondent in, taking issue with the findings of the Regional Director, asserted that its reasons for granting the wage increase at Heyburn were as follows:

1. Due to the similarity of the products manufactured, and the fact that there was an exchange of management and production personnel among its Heyburn, Burley, and Caldwell Food Processing Plants, the Company desired to maintain if possible a standard wage rate at all of its plants in the area, and
2. The Company desired to be competitive with the wage rates established by competing plants in the area. (R. 31-32).

As to the matters referred to in Objection 2 and 4 the Respondent stated that the conclusions of the Regional Director

> are not based upon the facts surrounding the conduct of the election and further that the conclusions of the Regional Director are inferential by their own admission, and the statements therein contain so much sham, irrelevant and redundant matter that they should be disregarded in their entirety by the Board. (R. 32).

At this point, the Board, despite the contradictory state of the record before it, did not call a hearing but summarily found that "the conduct (of the Respondent) with respect to Objections 1 and 2 constituted promises of and granting of benefits which were calculated to interfere with the election and formed a basis for setting it aside."

This the Board did despite the regulations pertaining to this matter which provide:

> If it appears to the Board that such exceptions (filed with respect to a Regional Director's Report on Objections to Elections) raise substantial and material factual issues, the Board may direct the Regional Director or other agent of the Board to issue and to cause to be served upon the parties a notice of hearing on said exceptions before a hearing officer. 29 C.F.R. § 102.69 (c) (Supp. 1962).

The full implication of the Board's action in deciding the case without ordering a hearing is set forth in *Tranchoa Chemical Corp.*, 133 NLRB No. 78 (1961). A case dealing with an election proceeding:

> It is the Board's practice in ruling on such Exceptions to give no evidentiary weight to the Regional Director's

> findings, but to take as true all matters of fact asserted in the Exceptions, and to overrule them without a hearing only if the facts asserted therein raise no substantial and material issue affecting the validity of the Regional Director's recommendations. Presumably the Board followed this procedure in evaluating the Respondent's Exceptions and its rejection thereof without granting a Hearing was tantamout to a holding that even if all the statements of fact in the Exceptions were taken to be true, they did not raise a substantial or material issue as to the validity of the Regional Director's recommendation that the Respondent's Objections to the election be dismissed.

Hence the Board's action in ordering the first election to be set aside without first holding a hearing was tantamount to a ruling that even though the Regional Director's conclusions with respect to Objections 2 and 4 were not based upon facts surrounding the conduct of the election and were inferential by their own admission and contained irrelevant and redundant matter; and even though the wage increase was given for the reasons stated in the Respondent's Exceptions, there were no substantial and material issues affecting the validity of the Regional Director's recommendations! Hence, even if the Exceptions had been proven to be true the Board in essence asserts that these facts would not have made any difference with respect to the order setting aside the first election.

It is apparent that the Board is following its *Tranchoa* doctrine in the instant case for in its brief filed with the Court the Board asserted that the Respondent's Exceptions did not raise any material factual issues which needed to be resolved

by a hearing officer. (Brief of Board pp. 13-16). With respect to the wage increase the Board said in its brief (p. 13) that the Respondent's Exceptions "merely asserted (the Respondent's) reasons for granting a wage increase." Is the Board forgetting that a basic issue established both in the Regional Director's Report and the Board's Order setting aside the first election was whether or not the wage increase "was calculated to interfere with the election." (R. 28, 63) What more could the Respondent do to create an issue in this regard than to allege its true motive for granting the wage increase.

The Board in its brief (p. 15) asserted that the Respondent made no attempt to controvert the remaining Objections. What more can the Respondent say to controvert these matters than to say that the findings and hence the recommendations are not based on the facts surrounding the election.

In view of the Respondent's Exceptions there can be little question that the Board's action in this case based upon the report of the Regional Director which in turn was based upon an *ex parte* undisclosed investigation was clearly arbitrary and capricious. As stated in *NLRB v. Sidran,* 181 F. 2d 671, 673, 674 (5th Cir. 1950) wherein an employer was upheld in his assertion that the Board in acting pursuant to a Regional Director's Report, had arbitrarily and capriciously ruled against the employer as to challenged ballots:

> We are of the opinion decision here must turn on the validity of the report of the Regional Director . . . The report was admittedly based upon an undisclosed *ex parte* investigation, and no hearing was ever held to support it . . . Moreover, if the Regional Director, under the guise of exercising a mere administrative discretion,

can decide strongly contested issues of voting eligibility without a hearing, he can in many instances arbitrarily determine a representation issue where the election results are destined to be close, adversely to either the union or the employer without even revealing the basis for such action. We find no logical justification either in the Act, the Board Rules and Regulations . . . for thus extending the discretionary powers of the Board or Regional Director so as to impair and infringe upon a party's constitutional rights . . . Here, before ruling in favor of the union on the eligibility status of these challenged employees, it is without dispute that the Regional Director held no hearing of any kind, either formal or informal. Although the eligibility and representation issues were vital to the case, no testimony of witnesses was adduced on this score, no documentary evidence was received, nor was a transcript of any proceedings before the Regional Director preserved. The record nowhere reveals what evidence he relied upon, how his investigation was conducted, or by what rules it was governed. Moreover, we can find no authority sufficient to justify this action in this regard and we do not believe that any such *valid* authority exists. We are therefore constrained to believe that under the circumstances here involved the failure of the Regional Director to grant a hearing to the parties on the eligibility issue was arbitrary and capricious as an unwarranted exercise of discretionary power under the Act, and contrary to all valid rules and regulations of the Board.

The capping point which illustrates that the Board in

making its decision without a hearing acted arbitrarily and capriciously is the fact that the Board, when it had the same issues, parties and factual situation before it in the context of an unfair labor practice proceeding, found after a full and open hearing that there was insufficient evidence to support a finding that the Respondent's wage increase was calculated to interfere with the election. As pointed out previously, an unfair labor practice complaint was filed against the Respondent in which the Board, *inter alia*, asserted that Respondent, in granting the aforesaid wage increase, had committed an unfair labor practice. The Trial Examiner in discussing the wage increase, stated:

> In order to establish that the wage increase granted February 21, 1961, to Respondent's Heyburn employees was violative of the Act, it could be argued that it would demonstrate to the Heyburn employees prior to a Board election that they could achieve the same economic benefits as the Union obtained for employees at Respondent's other two plants without the necessity of paying dues to the Union and therefore would have a reasonable tendency to influence them against selecting the union as their bargaining representative in the forthcoming election. (R. 71).

Thus it is evident that the Trial Examiner in the Unfair Labor Practice Case considered the exact same issue that was before the Board in the election case. As to this issue, the Trial Examiner then went on to find that:

> In the case at hand, *since the record establishes that it was the policy of Respondent to pay the same rates of pay at its three plants, and since the failure to grant the increase at the Heyburn Plant would put Respondent*

> *at a disadvantage with its competitors in the labor market,* I find that these circumstances are an adequate justification to remove the wage increase from the interdiction of Section 8 (a) (1). If the motive of Respondent is a test . . . I also find that the General Counsel has failed to establish an unlawful motivation on the part of Respondent. (R. 73 — emphasis added).

Thus it is clear that after a full and open hearing on the matter of the wage increase the Respondent's position rather than that of the Board was sustained. Interestingly enough, in the unfair labor practice case, the Board did not even charge the Respondent with making any of the alleged promises of benefit referred to in Objection 2 of the Regional Director's Report despite the fact that supposedly the Regional Director's *ex parte* investigation had revealed ample evidence to support a finding that such promises were made. The Board asserts in its brief at p. 14 that since the decision of the Trial Examiner was not appealed the Board is in no way bound by the decision. Though this may be true, nevertheless it is certain that the findings of the Trial Examiner made after a full and open hearing is strong evidence that the Board did act arbitrarily and capriciously in the representation proceeding. It is indeed strange that the Board would now insist that its findings based upon an *ex parte,* undisclosed investigation without a hearing should be sustained rather than findings arrived at on the basis of a full and open hearing!

In view of the foregoing it is obvious that the Board's decision not to hold a hearing was clearly arbitrary and capricious inasmuch as the Respondent's Exceptions did clearly create material and substantial issues of fact that could only be resolved

by ordering a hearing.

C. *Board's Allegation that Respondent was Not entitled to a Hearing Because its Exceptions to the Regional Director's Report Failed to Present Specific Evidence Which Prima Facie Would Warrant the Rejection of the Regional Director's Report by the Board is Unfounded and Contrary to Law.*

The Board asserts at Page 13 of its brief filed herein that before the Respondent is entitled to a hearing, the Respondent's Exceptions must present specific evidence which *prima facie* would warrant rejection of the Regional Director's Report. If the Regional Director's Report is to be taken as an example of "specific evidence," the Respondent respectfully submits that Respondent's assertions of its reasons for granting a wage increase and its assertion that the Regional Director was making conclusions based on non existing facts presented as much specific evidence to the Board as did the findings and conclusions of the Regional Director.

The Respondent further asserts that there is nothing in the Act, the Board Regulations or the Court or Board decisions which requires the Respondent to present specific evidence which would warrant rejection of the Regional Director's Report. The implication from the regulations is that the Regional Director's Report together with the Respondent's Exceptions must only create substantial and material issues of fact in order to warrant the ordering of a hearing. The Regulations pertaining to the matter clearly state that a hearing may be held by the Board "if it appears to the Board that such exceptions raise substantial and material factual issues." 29 C.F.R. § 102.69 (c) (Supp. 1962).

The cases that the Board cites as authority for its *prima*

facie doctrine are inapposite. Both *NLRB v. O. K. Van Storage, Inc.* 297 F. 2d 74 (5th Cir. 1961) and *NLRB v. Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369 (5th Cir.), *cert. denied,* 348 U. S. 873 (1954) deal with the alleged failure of a party making objections to an election to make out a *prima facie* case in such objections. It must be remembered that the filing of Objections is the first step in attempting to get an election set aside, and for the sake of argument it may be conceded that the party instigating such an action must establish a *prima facie* case. However such cases pertaining to this phase of the procedure could hardly be precedent for requiring a party filing exceptions to a Regional Director's Report to supply specific evidence which *prima facie* would warrant the Board rejecting the Regional Director's Report.

To hold at this point that the Respondent must supply such evidence in its Exceptions to the Regional Director's Report would be manifestly unjust and would be in violation of the Administrative Procedures Act.[4] Nowhere in the Act, Regulations or Court or Board decisions is such a policy set forth. Rather the regulations clearly indicate that the Respondent's Exceptions must only create an issue of fact. Hence if the

[4] § 3 of the Administrative Procedures Act provides that "every Agency shall separately state and currently publish in the Federal Register . . . statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public . . . No person shall in any manner be required to resort to organization or procedure not so published." Administrative Procedures Act § 3, 60 Stat. 238, 5 U.S.C. 1002.

Board desires that Exceptions to a Regional Director's Report supply specific evidence than they must, pursuant to the Administrative Procedures Act, adopt a regulation setting forth such requirement. *Graham v. Lawrimore,* 185 F. Supp. 761 (D.E.D. So. Carolina 1960).

As stated in *Foreman & Clark, supra,*

> the clear purpose of Section 3 (a) of the (Administrative Procedures Act) is to provide a shield for a petitioner before the Board, or other Agency, to protect him from being penalized for failing to resort to unpublished methods of procedure.

D. *The Board's Decision Setting Aside the First Election is Arbitrary and Capricious in That it Was Not Based Upon Substantial Competent Evidence.*

Assuming *arguendo* that the Board's failure to order a hearing prior to making its decision and order with respect to the first election could be excused or was not arbitrary and capricious, the Respondent urges that the so-called "evidence" before the Board on which it based its finding in setting aside the election was so insubstantial that the action of the Board based on such evidence was arbitrary and capricious, particularly in view of the Respondent's Exceptions to the Regional Director's Report.

1. *The Board's Findings and Conclusions with Respect to the Wage Increase are not Supported by Substantial Evidence.*

Again it must be remembered that the Board found that the wage increase granted by the Respondent "was calculated to interfere with the election" and further that basic to the Regional Director's recommendations pertaining to the wage in-

crease was his determination that there was no evidence that the wage increase or the announcement thereof were governed by factors other than the pendency of the elections. The key issue with regard to the wage increase concerned the matter of the motivation and purpose behind the granting of the increase.

With regard to motivation, the only relevant, conceded fact that the Board had before it was that the Respondent had given a wage increase at its Heyburn Operations which was announced six days after the Board had ordered an election at the Heyburn Plant. (R. 10-11) The election was held over a month after the wage increase was announced. (R. 10) However the mere granting of the increase is insufficient to support a finding that the election should be set aside for even the Board itself, as recognized by the Regional Director in his report (R. 28), rejects the doctrine that the mere granting of a wage increase during the pendency of an election is *per se* grounds for setting aside an election. *United Screw & Bolt Corp.* 91 NLRB 916 (1950). Though the Regional Director asserted that there was no evidence that the timing of the wage increase or the announcement thereof were governed by factors other than the pendency of an election, the Respondent in its Exceptions asserted that "because of the nature of these three operations and the similarity of the products manufactured, and the fact that there was an exchange of management and production personnel, the Company desired to maintain if possible a standard wage rate in all plants." The Company also asserted in addition to the foregoing that it granted the wage increase at Heyburn in order to "be competitive with the wage rates established by competing plants in the area."

On this basis, if the Board had followed its practice as set

forth in *Tranchoa Chemical Corp. supra* and given no evidentiary weight to the Regional Director's findings it would have had to find in favor of the Respondent.

Since the Board itself rejects the doctrine that the granting of a wage increase during the pendency of an election is not *per se* grounds for setting aside the election and since the Exceptions filed by the Respondent established a motive for granting the wage increase other than the pendency of the election, it is clear that the Board's finding with respect to the wage increase was totally unfounded even by its own standards and thus was arbitrary and capricious. This contention is resoundingly supported by the finding of the Trial Examiner in the unfair labor practice proceeding which upheld the Respondent's position on the wage increase and flatly asserted that the Board had failed to establish "an unlawful motivation on the part of the Respondent." Thus when put to the test of proving its contentions as to the wage increase the Board was unable to adduce sufficient evidence to support it!

2. *The Board's Findings with Respect to the Matters Referred to in Objection* 2 *as Stated in the Regional Director's Report were not Founded on Substantial Evidence.*

With respect to the matters covered by Objection 2 of the Regional Director's Report, the Board found that the Respondent did the things alleged in that Objection and that this conduct constituted promises of benefit calculated to interfere with the election. Again the Board had before it only the Regional Director's Report based upon an *ex parte* undisclosed investigation. With respect to these matters the Regional Director's Report was clearly nothing more than a statement of conclusions arrived at by the Regional Director. The actual

evidence supposedly supporting these conclusions was apparently obtained in the *ex parte* investigation conducted by the Regional Director. But this evidence was not before the Board when it made its findings and conclusions and ordered the election set aside.

If the Repondent had not challenged the findings and recommendations of the Regional Director then perhaps the Board would have been warranted in relying upon the Regional Director's Report. But the Respondent clearly contradicted these findings and recommendations, for in its Exceptions to the Regional Director's Report, the Respondent stated that such conclusions:

> are not based upon the facts surrounding the conduct of the election and further that the conclusions of the Regional Director are inferential by their own admission, and the statements therein contain so much sham, irrelevant, and redundant matter that they should be disregarded in their entirety by the Board.

Hence there was not one shred of competent evidence before the Board to support its finding either that the conduct referred to had in fact occurred or assuming that such conduct occurred, that the Respondent had performed it.

Additionally a review of the Regional Director's Report with respect to the matters referred to in Objection 2 makes clear that the finding that these matters constitute promises of benefit calculated to interfere with the election is without supporting evidence in the record.

With respect to the allegation in Objection 2 that the Respondent utilized a local newspaper to advertise increased benefits negotiated at the unionized plants of the employer, it is clear that this newspaper statement standing alone is not the promise of anything. Furthermore, its relevance in proving that any other promises were made is questionable. Only by placing

it in the context of other actions could the resume' of the newspaper statement take on any significance, and that context was not before the Board except by virtue of conclusions, inferences, and innuendos supplied by the Regional Director in his report which was based on the *ex parte* investigation, which as indicated in the Respondent's Exceptions as supported by the Trial Examiner in the previous unfair labor practice case, apparently did not include all the facts. Of course, as mentioned previously, there was not one shred of evidence which connected the Respondent or its election campaign to the alleged statement in the newspaper, nor was the whole newspaper statement before the Board.

As to the allegations with reference to the hand bulletins, correspondence, and questionnaires allegedly given by the Respondent to its employees which allegedly pointed out that the Respondent intended "to give the employees the same fair and equitable treatment insofar as job classifications, working conditions, and type of operations permit," it should be noted that the Regional Director — apparently quoting the above directly from some literature — had to supply the innuendo "regardless of union affiliation." Hence we have an incomplete statement which, standing alone and taken out of context, is not a promise of anything, being placed in a context selected by the Regional Director on the basis of certain literature not disclosed in or made a part of his report. Furthermore it must again be noted that there was not one shred of competent evidence before the Board which directly linked any such statement or literature to the Respondent.

However even if the quoted statement together with the innuendo supplied by the Regional Director were taken on

its face to be a correct statement, it yields just as readily to the interpretation that the Respondent was not going to discriminate against its employees because of their union affiliation as it does to an indication that the Respondent was promising benefits to the employees if they refused to vote for the union. The former is only a statement of the position that the Respondent must take in such circumstances, i.e. it must not discriminate against any of its employees because of their union activities. Hence to prevent the Respondent from making such a statement is to deprive it of the right to state its legal position in such matters.

As to the statement to the effect that the Respondent "invited employees' attention to the identity between specific conditions of employment at the Heyburn Plant and those at plants covered by the petitioner's collective bargaining agreements, it should first be noted that the literature wherein such comparison was allegedly made was not divulged by the Regional Director either to the Respondent or the Board, hence the context within which such comparison was made is absent. Nor was there any competent evidence before the Board in the election proceeding which connected any such comparison to the Respondent or its election campaign.

It is obvious that the comparison standing alone makes no promise whatsoever. As a matter of fact, standing alone, such comparison could just as easily have been a reply to misleading statements contained in literature distributed by the Union which if not answered by the Respondent would have furnished the basis for setting aside the election. Whether or not the latter is in fact the case is, of course, not revealed by the Record, but the fact is that the Board as the deciding agency did not

have before it the evidence to determine whether or not the context surrounding the alleged comparison was such as to make it a promise of benefit or an answer to mis-statements of the Union or anything else. However, the Board did have before it the Respondent's Exceptions to the Regional Director's Report with reference to the matters contained in said objections in which the Respondent said:

> such conclusions are not based upon the facts surrounding the conduct of the election, and further . . . the conclusions of the Regional Director are inferential by their own admission, and the statements therein contain so much sham, irrelevant . . . matter that they should be disregarded in their entirety by the Board.

The Board in its Brief in attempting to support its action setting aside the election has asserted that its findings and conclusions were based upon uncontroverted facts. In view of the Respondent's Exceptions to the Regional Director's Report it seems unbelievable that the Board could assert that there were any uncontroverted facts upon which it could base its decision. In addition the Board assumes that everything stated in the Regional Director's Report is a fact, whereas the truth of the matter as noted above is that the Regional Director's Report was nothing but a collection of conclusions based on alleged facts discovered in an *ex parte* undisclosed investigation and hence the Board had before it no evidentiary facts upon which it could base its findings with respect to setting aside the election.

Thus it is clear that the Board's finding that the Respondent performed the conduct referred to in Objection 2 and that such conduct constituted promises of benefit calculated to interfere with the election, based solely on the Regional Director's

Report, in view of the Respondent's Exceptions thereto was not based upon substantial evidence in the record and thus was totally unreasonable, arbitrary and capricious.

IV.

The Board's action in arbitrarily and capriciously determining that the First Election should be set aside for the reasons stated in its Decision and Order on the basis of the evidence before it without ordering a hearing deprived the Respondent of its right to due process of law.

From the foregoing it is evident that the Board acted arbitrarily and capriciously in not ordering a hearing before deciding whether or not to set the first election aside. It is further evident that the Board's findings on which it based its order to set the election aside were arrived at in an arbitrary and capricious manner in that they were based on insufficient evidence. The Respondent contends that this arbitrary and capricious action deprived Respondent of its right to due process of law under the Fifth Amendment to the United States Constitution.

A. *Though Administrative Agencies may have Broad Discretionary Power They are Still Obligated to Abide by Basic Principals of Fair Play.*

In *NLRB v. Prettyman,* 117 F. 2d 786 (6th Cir. 1941) the court, quoting from *Morgan v. U.S.,* 304 U.S. 1, 14, 58 S. Ct. 773, 775, said:

> The first question goes to the very foundation of the action of administratitive agencies intrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made

> possible under our system by adherence to the basic principal that . . . in administratitive proceedings of a quasi judicial character the liberty and property of the citizens shall be protected by the rudimentary requirements of fair play. These demand a fair and open hearing — essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an inexorable safeguard.

Prettyman involved an attempt by the Board to hold a hearing in an Unfair Labor Practice Proceeding some 600 miles from the Respondent's place of business. In the instant case the Board held no hearing at all.

As stated in *NLRB v. Indiana and Michigan Electric Company, supra*:

> findings cannot be said to have been fairly reached until material evidence which might impeach as well as that which will support its findings is heard and weighed.

The Board in its Brief at page 10 asserted that the Respondent's interest in the representation proceedings is "very unsubstantial." In regard to this assertion it must first be noted that *Foreman & Clark v. NLRB* cited by the Board in support of this contention is inapposite because it deals with an altogether different phase of the representation proceeding. The issue in *Foreman* was whether or not an appropriate unit had been established. The issue in the instant case is whether or not the employees in Respondent's plant should be represented by a union, i.e., in common parlance "should the plant be union-

ized." Respondent urges that it has a very real interest in whether or not its plant should be unionized. No one can doubt that the unionizing of a plant has a tremendous impact upon the business interests of an employer.

As stated in *American Cable and Radio Corp. v. Douds,* 111 F. Supp. 482 (D.S. D. N.Y. 1953), a case dealing with procedure pertaining to representation matters,

> of course the employer has an obvious ultimate interest in who the collective bargaining representative is to be; and he may ultimately secure judicial review on the issue of whether the Board properly followed the procedure required by the legislation and whether there is substantial evidence to support its action.

That the Respondent as an employer has a real interest to be protected by due process and that it has been denied of due process by the procedures used by the Board in the instant case is emphatically supported in *NLBR v. West Texas Utilities Co.,* 214 F. 2d 732, 742 (5th Cir. 1954) wherein the court stated:

> It sufficiently appears that the respondent was denied due process by the inadequate and *ex parte* method of investigating and disposing of its exceptions and charges; that the finding of the Board that the union was duly elected and respondent was guilty of unfair labor practices in not recognizing it as the representative of its employees is without legal support in the Record; and that enforcement of the Board's order should be and it is denied.

In *West Texas Utilities,* the Company, as in the instant case, had refused to bargain with the Union which the Board had certified pursuant to a board conducted election — the val-

idity of which the employer challenged.

Also supporting this contention is the case of *NLRB v. Sidran, supra,* wherein the court held that to allow the Board to rule on challenged ballots on the basis of an undisclosed, *ex parte* investigation without a hearing, deprived the Respondent therein of a fair trial.

B. *A Further Implication of the Board's Decision and Action in this Case Which Supports the Respondent's Contention that said Decision and Action Deprived the Respondent of Its Rights Under the Act and the Fifth Amendment of the Constitution is the Fact that as a Result of the Board's Procedures and Decision in the Election Proceeding, the Respondent is Unable to Determine What its Unlawful Acts were and what it must do to Abide by the Law.*

As noted previously, the Respondent's alleged expressions and actions set forth in Objection 2 of the Regional Director's Report do not on their face constitute promises of anything, nor do they on their face show any intent on the part of the respondent to unlawfully interfere with the election.

On first impression it would appear that the ruling of the Board pertaining to this conduct is simply that the Respondent must refrain from thus expressing itself in the future during the pendency of election. However, since none of the conduct referred to in Objection 2 on its face constitutes promises of benefit, it becomes apparent that the full implication of the holding of the Board is that the expressions proscribed by the virtue of the Board's decision are those adverted to in Objection 2 *together with the context in which they were made,* and it is that context which gave such alleged conduct its unlawful connotation. However, the Respondent does not know what that

ontext is and for that matter, neither does the Board. Hence, he Respondent has been found guilty of certain allegedly mproper action but neither the Respondent nor the Board nows fully what the improper action consists of nor does either he Board or the Respondent know what the Respondent must lo to cease its alleged unlawful conduct! Hence in view of the oregoing it is clear that the Board's action in this case denied the Respondent its right to due process under the Fifth Amendment to the United States Constitution.

V.

The Board's action in this case is unlawful in that it subverts the provisions of the act pertaining to the finding of unfair labor practices and thus denies the Respondent of the right to due process.

The Respondent has conceded that the Board has broad discretion in determining whether the results of an election represent the free and untrammeled choice of the Respondent's employees. The test established by the Board in such matters is whether or not the conduct surrounding the election created an atmosphere which rendered free and untrammeled choice improbable. *Hicks-Hayward Co.*, 118 NLRB 695 (1957); *General Shoe Corp.*, 77 NLRB 124, 126-127 (1948); *NLRB v. Shirlington Supermarket, Inc., supra.*

However, in this case the Board expressly did not pass upon "the question whether the employer's conduct considered as a whole created an atmosphere rendering expression of free choice impossible." Instead the Board simply found that the Respondent's conduct with respect to Objections 1 and 2 "constituted promises of and granting of benefits which were calculated to interfere with the election and formed the basis for setting it aside." The findings thus made by the Board are

the same findings upon which the finding of the commission of an unfair labor practice may be based, for the Board and the Courts have consistently ruled that granting or making of promises of benefits which are calculated to unduly interfere with a Board conducted representation election constitute an unfair labor practice. *Joy Silk Mills, Inc. v. NLRB,* 185 F. 2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914, 71 S. Ct. 734 (1951); *Eastman Cotton Mills,* 90 NLRB 31 (1950).

Most certainly to allow the Board to use the representation procedures and in particular those procedures used in the election proceeding in this case to find that certain ambiguous conduct allegedy performed by the Respondent constituted promises of and granting of benefits is absolutely and totally unlawful inasmuch as the findings and conclusions, tantamount to unfair labor practices, were arrived at by procedures which are contrary to the Act, and the regulations of the Board.

The procedures to be followed in cases involving unfair labor practices are set forth in Sections 10 (*a*) to (*l*) of the Act, and Sections 102.9 to 102.33 of the Board's regulations. 29 C.F.R. §§ 102.9-102.33 (Supp. 1962). These procedures *inter alia* provide that:

> 1. The party being charged is entitled to a hearing regardless of whether or not the Board or Regional Director believes that there are substantial issues of fact involved;
>
> 2. Proceedings shall be conducted in accordance with the rules of evidence applicable to the District Courts of the United States as far as possible;
>
> 3. The record of the hearing must be submitted to the Board and the Board must find on *a preponderance of*

the evidence that the acts complained of constitute unfair labor practices; and

4. A party to a proceeding is entitled to an immediate review of the final order of the Board and the Board findings of fact may be sustained only as supported by substantial evidence in the record considered as a whole.

In addition there are other regulations and a myriad of rulings of the courts too numerous to set forth which carefully set out the procedures which must be followed to find that a party has made promises of or granted benefits which were calculated to interfere with an election.

In contrast, the Board in arriving at the conclusions that it did in this case, did so under regulations which grant Respondent no absolute right to a hearing. It based its decision upon materials that would not be competent evidence in any District Court of the United States and therefore there was in fact no competent evidence before the Board to allow it to make its findings on the basis of any preponderance of evidence. Furthermore, the Respondent was foreclosed from any direct appeal of the Board's decision inasmuch as it was not a final decision. Thus Respondent was compelled to labor under the ruling of the Board that it had unduly interfered with the first election until it could get an indirect review thereof through this refusal to bargain proceeding — a review that it would never have had if the Union had lost the second election.

The only possible conclusion in view of the foregoing is that the Board, in acting as it did, has evaded the provisions of the Act and the Board regulations to unlawfully find the Respondent guilty of unfair labor practices with the sanction of setting aside the election.

The Board in its Brief alleges, in essence, that since the finding that the Respondent had performed certain conduct which "constituted promises of granting of benefits which were calculated to interfere with the election" was arrived at in a representation rather than an unfair labor practice proceeding, the Respondent has not been found guilty of an unfair labor practice. (Brief pp. 9-11). Although the Board may not have expressly found that the Respondent committed an unfair labor practice, the Respondent respectfully submits that the result is still the same and further submits that the mere name or type of proceeding is not the determining factor. Regardless of the name or type of proceeding the Respondent has been found guilty of conduct which constitutes an unfair labor practice with the customary sanction of setting aside the election – yet without the benefit of the protective provisions of the Act pertaining to the finding of unfair labor practices. The real significance of such a circumstance is that if the Board's action is approved and enforced, then whenever such conduct allegedly occurs in the context of an election, the Board may by the use of the procedures used in this case, summarily find a party guilty of conduct amounting to an unfair labor practice. In short if the decision of the Board in this case is enforceable what is there to prevent the Board from using the procedures it did in this case rather than the ordinary procedures set down in the act for the finding of unfair labor practices in all cases pertaining to conduct surrounding an election.

Even though it may be conceded *arguendo* that the Board may in a representation proceeding find that a party has performed conduct which constituted promises of and the granting of benefits calculated to interfere with an election the Re-

pondent asserts that if its rights are to be protected then the procedures used in such proceeding must not be arbitrary and capricious as they were in this case but rather must be arrived at in a manner that will give the Respondent the protection it is entitled to under the Act and under the Fifth Amendment of the Constitution.

VI.

The Board's action in this case unlawfully deprives the Respondent of its right to express its views as permitted by Section 8 (c) of the Act and the First Amendment to the Constitution of the United States.

To allow the Board to evade the provisions of the Act and the Board regulations as stated above and in essence find the respondent guilty of an unfair labor practice would indeed be a serious matter, but a consideration of an additional ramification of such a situation makes the matter even more reprehensible, for one of the direct results of such a circumstance is to deprive the respondent of the right to express its views as permitted by Section 8 (c) of the Act and the First Amendment to the Constitution of the United States.

It is conceded that acts which do in fact constitute promises of and granting of benefits which are calculated to interfere with an election may be proscribed as unfair labor practices without the denial to the party involved of its rights under the Act and the First Amendment of the Constitution. It is further conceded that the Board has been allowed to set aside elections on the basis that certain conduct unduly interfered with an election even though the conduct in question constituted expressions of views which were otherwise lawful and under Section 8 (c) of the Act could not constitute or be evidence of an unfair labor practice because they contained no threat

of reprisal or force or promise of benefit. But here it must be remembered that the Board based its decision in the election proceeding not on the finding that certain conduct interfered with an election but rather that certain conduct *"constituted promises of and granting of benefits* which were calculated to interfere with the election." Hence, implicit to the finding of the Board that the election must be set aside was the finding that the conduct referred to constituted promises of and granting of benefits which were calculated to interfere with the election.

This finding of the Board was made solely on the basis of the Regional Director's Report which contained only a fragmentary part of expressions allegedly made by Respondent. Such "evidence" in an unfair labor practice proceeding clearly would not support a finding that the Respondent had made promises of and granted benefits which were calculated to interfere with the election. In *NLRB v. West Kentucky Coal Co.*, 152 F. 2d 198, 202 (6th Cir. 1945), cert. denied, 328 U.S. 866, 66 S. Ct. 1372 (1946), in which the Board asserted that a certain statement made by an employer unlawfully interefered with the conduct of a Board election, the court noted that the statement in question did not appear in full in the Examiner's Intermediate Report. As to this the court said:

> This circumstance alone, that we have only partial quotations of the statement before us, would require us not to sustain the Board upon this feature of the case. Since the Board here seeks enforcement of its order, it has the burden of proof, and that proof is not sustained with reference to a charge of unfair labor practice growing out of an expression of opinion by an

employer unless the entire statement is given.

To the same effect is *NLRB v. Mylan-Sparta Co.*, 166 F. d 485, 490 (6th Cir. 1948) in which the Board asserted that certain speech which it characterized as an openly anti-union peech unlawfully threatened or coerced certain employees. In nat case the court said:

> The record fails to show very definitely what Wallace said or the exact words used, the evidence dealing mostly in generalities and conclusions. This in itself is a failure to comply with the rule announced by this court in *NLRB v. West Kentucky Coal Co.*, . . . that partial quotations from a speech are not sufficient to sustain the burden of proof.

The Respondent contends that the conclusion of the Board hat the conduct referred to in Objection 2 constituted promises f benefit calculated to interfere with an election, being tanta- nount to an unfair labor practice, and with such far-reaching mplications with respect to the vital rights of the respondent annot be lawfully arrived at by the virtue of the Board's ummary election procedures and in particular by the pro- edures used by the Board in the election proceeding in this ase. The result of such findings and conclusions whether eached by the Board's election or unfair labor practice pro- edures is the same. In either case the charged party is fore- losed under the law from so expressing its views by impending anction of setting aside the election.

To allow the Board to restrict the expression of the espondent by the use of its summary election procedures and n particular by the procedures used in the instant case would e to allow the Board to evade the elaborate procedures set

down by the Act, Board regulations and court decisions for finding a charged party guilty of making promises of benefit calculated to interfere with an election in unfair labor practice proceedings with the resulting effect upon the right to the freedom of expression as guaranteed by the Act and the First Amendment. The ultimate effect of such a ruling would be to nullify the provisions of the Act setting forth such procedures in all cases dealing with the expression of views in Board conducted elections. To hold that the Respondent may be so effectively muzzled upon a fragmentary report of clearly ambiguous statements based on an *ex parte* undisclosed investigation under the summary procedures followed indeed shocks the conscience. Though in this case it is the charged party which is the victim, such procedure might well become a two-edged sword applied at the whim and caprice of the Board against either the charged or charging party.

Hence clearly the action of the Board in the instant case was unlawful in that the procedures followed by the Board in arriving at its conclusion in the election proceeding were contrary to the provisions of the Act and the regulations of the Board with the resulting deprival of the Respondent of its right to the freedom of expression guaranteed by the Act and by the First Amendment to the Constitution of the United States.

VII. Conclusion

In conclusion, the Respondent asserts and respectfully requests this Honorable Court to find that the Board's action in setting aside the first election was arbitrary and capricious and therefore denied the Respondent of its right to due process in that the Board failed to order a hearing after receiving the

Respondent's Exceptions to the Regional Director's Report and proceeded to make its findings and conclusions on the basis of insufficient evidence; that the Board's action was unlawful and denied the Respondent of due process in that the Board used the summary election procedures to subvert the provisions of the Act pertaining to the finding of unfair labor practices; and that the Board's action denied the Respondent of its right to express its views under Section 8 (c) of the Act and the First Amendment to the United States Constitution; and that thus the Respondent has no duty to bargain with the Union inasmuch as the Union was certified as the bargaining agent pursuant to an election held within one year of a valid election.

Hence the Respondent respectfully requests the Court to deny the Board's petition for enforcement of its order.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Dennis M. Olsen

January, 1963

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) in addition to those printed in the Appendix to the Board's Brief are as follows:

Unfair Labor Practices

Sec. 8 (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Prevention of Unfair Labor Practices

Sec. 10 (b) . . . Any such (unfair labor practice hearing) proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, §§ 723-B, 723-C).

Sec. 10 (c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . .